109-200

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~302.~~ 57

THE UNITED STATES, APPELLANT,

vs.

FRANCIS A. GIBBONS, JR.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 4, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 302.

THE UNITED STATES, APPELLANT,

vs.

FRANCIS A. GIBBONS, JR.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition, filed December 7, 1872	1	1
Traverse, filed February 14, 1873	17	10
Plea of limitation, filed March 20, 1874	18	11
Findings of fact and conclusion of law	19	11
Opinion of the court	28	22
Dissenting opinion	32	26
Final judgment	38	32
Appeal	39	32
Certificate	40	32

1 In the United States Court of Claims.

FRANCIS A. GIBBONS, JR., }
vs. } No. 6845.
THE UNITED STATES. }

I. *Petition.—Filed Dec.* 7, 1872.—J. R.

The petitioner, Francis A. Gibbons, jr., who is a citizen of the United States and a resident of the city of Baltimore, by this petition respectfully shows as follows, to wit:

That about the time of the outbreak of the late civil war, and early in the year 1861, the buildings of the United States at the Norfolk navy-yard were much injured by fire, but a large portion of the brick walls and heavy masonry was left standing, apparently in a substantial and serviceable condition.

Afterwards and upon an inspection of the said walls and masonry of the entrance buildings, known on the plan of the yard as number 19 and number 37, and of the carpenter shop near the dry dock, it was determined by the engineers and officers of the United States in charge thereof
2 that such walls and masonry were in a sufficiently good state of preservation to be used without alteration, and to be carried up to a proper height, and that instead of the construction of new buildings entire the old ones should be repaired.

Thereupon, and on or about the 17th day of April, 1866, an advertisement was published by the United States, inviting proposals for repairing said buildings, a copy of which advertisement is hereto annexed and referred to as part of this petition.

That the petitioner visited the said yard, in pursuance of the directions contained in said advertisement, and examined the plans and specifications for said buildings prepared and exhibited by the proper officers of the defendants, and at the same time the old walls and foundations designed to remain and form a part of the said buildings, so to be repaired, were pointed out and explained to the petitioner by the authorized agents of the United States.

That the petitioner thereupon made proposals in writing for said repairs, in pursuance of said invitation of the defendants, which proposals contained the lowest bids for said entrance buildings and said carpenter shop. A contract was afterwards, on the 22d day of May, 1866, and in pursuance of said advertisement and proposals between the United States, acting in that behalf by Joseph Smith, an officer of the United States Navy, and chief of the Bureau of Yards and Docks of the Navy Department, and your petitioner, by which he agreed to repair, and complete such repairs to the satisfaction of the defendants, the said entrance buildings within the space of one hundred and twenty days, exclusive of Sundays and holidays, from the date of said contract, for the sum of $48,267.95, and the said carpenter shop within the space of thirty days from the date of said contract, for the sum of $13,837.81. It was further stipulated that certain specified
3 material should be furnished to the petitioner by the defendants in addition to the above-named considerations.

A copy of said contract, together with the said specifications upon which

said proposals were made and which are referred to in and made a part of said contract, are hereto annexed and referred to as part of this petition.

That your petitioner was required to and did at the same time execute and deliver to the defendants a bond with approved sureties in the penal sum of $125,000.00 for the faithful performance of said contract.

That after the execution and delivery of the said contract, as petitioner is informed and believes, the agents of the defendants attempted to change, unlawfully, the terms of said contract, by erasing from the said specifications the words "provided always, that nothing here shall be construed as obligatory on the contractor to furnish any materials or fixtures or do any work without the province of these specifications."

That in pursuance of the said contract, the petitioner immediately commenced the construction of said buildings, but when the old walls and foundations of the former buildings, which were considered (and pointed out to your petitioner as aforesaid) as uninjured and proper and suitable to form a part of the repaired buildings, were closely examined and tested, it was discovered that none of the said old walls and foundations were fit to be repaired or built upon, except a very small portion thereof, and they were accordingly condemned, and your petitioner was, thereupon, required to take down such condemned walls and take out such condemned foundations and to furnish the materials and construct new buildings instead of repairing old ones.

That your petitioner furnished the materials and performed the
4 labor in and about said buildings, according to the directions of the authorized agents of the defendants, and said work and materials were fully approved, and the said buildings were duly accepted and received by the defendants from your petitioner.

In the completion of the said buildings, and in consequence of the injured and worthless condition of the said old walls and foundations, your petitioner was required to and did furnish a great quantity of materials and perform a great deal of labor not contemplated by the agents of the defendants nor by your petitioner at the time of executing said contract, and not included within the terms of the said contract and plans nor within said specifications, and that said labor and materials so performed and furnished in addition to and beyond the terms of said contract were reasonably worth the sum of $80,926.44 over and above the contract price hereinbefore specified; and the said defendants, although often requested so to do, have not paid the said sum to the petitioner, and that there is justly due to him from the Government of the United States as follows:

For furnishing materials and constructing the entrance buildings, Nos. 19 and 37		$116,872 20
For furnishing materials and constructing the carpenter shop		26,100 00
		$142,972 20
Deduct for cash paid	$65,545 76	
" for materials furnished	977 70	
" for old wall used	8,100 00	
		74,623 46
Balance due		$68,348 74

Your petitioner therefore demands judgment against the United States for the sum of sixty-eight thousand three hundred and forty-eight dollars and seventy-four cents ($68,348.74).

5 That all the interest of the petitioner in the claim has been sold and transferred by him to his father, Francis A. Gibbons, senior, who superintended the work for him, and who furnished all the money and materials necessary to complete the said buildings, and your petitioner prays that the judgment in the premises may be entered for the use of said Francis A. Gibbons, senior.

Your petitioner further says that he has and that said Francis A. Gibbons, senior, has at all times borne true allegiance to the United States Government, and that neither of them has, at any time or in any manner, voluntarily aided, abetted, or given encouragement to the rebellion against said Government.

FRANCIS A. GIBBONS, JR.,
By FRANCIS A. GIBBONS, SR.

ENOCH TOTTEN,
Attorney for Petitioner, Washington, D. C.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Francis A. Gibbons, senior, being first duly sworn, do depose and on my oath say that I am the assignee of the foregoing claim and am the father of the said claimant; that I superintended the work mentioned in said petition, and know the facts therein stated on personal knowledge; that no assignment or transfer of the said claim has been made except as in said petition stated, and that said petitioner is justly entitled to the amount claimed in said petition from the United States after allowing all just credits and offsets; and I believe the facts stated in said petition are true.

FRANCIS A. GIBBONS, SR.

Subscribed and sworn to before me this 7th day of December, 1872.
E. L. SCHMIDT, *N. P.* [SEAL.]

6 *Copy of advertisement inviting proposals.*

NAVY DEPARTMENT,
Bureau of Yards and Docks, April 17, 1866.

Sealed proposals for each building separately, endorsed "Proposals for repairing buildings at the Norfolk navy-yard," will be received at this office until 12 o'clock m. on the 15th day of May, 1866, at which hour the opening of the bids will be commenced for repairing the entrance buildings, known on the plan of the yard as Nos. 19 and 37; boat shed, No. 29; timber shed, No. 30; timber shed, No. 31; and the carpenter's shop near the dry dock. The offer for Nos. 19 and 37 will be embraced in one bid, and those for the other buildings must be separate.

Bidders will be required to state the amounts for which they will furnish all the materials and complete each building according to the plans and specifications to be seen at the yard, using such materials as are on hand for each building, which have been purchased by the Government, as per schedules at the yard.

Each bid must be accompanied by good and sufficient guarantors, ap-

proved by an officer of the Government known to this Department, that the bidder will, if his offer be accepted, enter into contract to perform the work bid for; and the Department reserves the right to accept or reject any or all of the bids, as the interest of the Government may require.

Bidders are requested to name the time in which they will engage to complete any or all of the buildings, and if their offers are accepted they will be held to a faithful execution of their contract, under a forfeiture in case of failure.

Persons desiring to bid must necessarily visit the yard and examine the present condition of the works, and can there see the plans and specifications, to enable them to bid understandingly.

Copy of contract.

This contract, made and entered into this twenty-second day of May, one thousand eight hundred and sixty-six, between Francis A. Gibbons, jr., of the city of Baltimore, in the State of Maryland, as principal, and Francis
7 A. Gibbons, sr., of Baltimore, in the State of Maryland, and Chas. D. Gilmore, and A. A. Homer, of Washington, in the District of Columbia, as sureties, of the first part, and the United States, by Joseph Smith (chief of the Bureau of Yards and Docks), acting under the authority of the Navy Department, for and in their behalf, of the second part, witnesseth:

That the said parties of the first part do hereby contract and engage with the said United States as follows: That in consideration of the payments hereinafter mentioned, the parties of the fi'st part hereby contract and agree with the said United States to furnish at their own risk and expense all the materials and work necessary for the repairs of the entrance buildings Nos. 19 and 37 and the carpenter shop at the Norfolk navy-yard, and finish and complete the same according to the plans and specifications hereto annexed, which form a part of this contract; said entrance buildings Nos. 19 and 37 to be entirely completed, ready for occupation, and delivered to the party of the second part within one hundred and twenty days from and after the date of this contract, exclusive of Sundays and holidays, and the carpenters' shop to be entirely completed within thirty days from and after the date of this contract, exclusive of Sundays and holidays.

And it is further mutually agreed by the parties to this contract that all the materials furnished and work performed shall be of the best quality, and subject to the inspection, approval, or rejection of the superintendent, to be appointed on the part of the United States, who shall have full power to reject any materials or workmanship which, in his opinion, are not of the best quality; and all rejected materials shall be immediately removed from the premises, and all rejected work shall be immediately taken down and properly rebuilt, or otherwise made satisfactory; old materials from the building, if suitable, may be used in reconstruction.

The Bureau shall have the power of annulling this contract, without loss or damage to the Government, in case the contractor shall fail to perform all or any of the covenants herein provided on his part.

And the said parties of the first part do further engage and contract that no member of Congress, officer of the Navy, or any person holding

any office or appointment under the Navy Department shall be ad-
8 mitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. And it is hereby expressly provided—and this contract is upon this express condition—that if any such member of Congress, officer of the Navy, or other person above named shall be admitted to any share or part of this contract, or to any benefit to arise under it, or in case the parties of the first part shall, in any respect, fail to perform this contract on their part, the same may be, at the option of the United States, declared null and void, without affecting their right to recover for defaults which may have occurred.

And the party of the second part hereby contracts and agrees that, for the full and entire completion of the entrance buildings Nos. 19 and 37, to the satisfaction of the party of the second part, there shall be paid to the parties of the first part, by the party of the second part, the sum of forty-eight thousand two hundred and seven and ninety-five one-hundredths dollars; and for the full and entire completion of the carpenters' shop, to the satisfaction of the party of the second part, there shall be paid to the parties of the first part, by the party of the second part, the sum of thirteen thousand eight hundred thirty-seven and eighty-one hundredths dollars.

Said payments to be made in the following manner: When the superintendent shall certify that one-fourth of the materials and labor are delivered and performed on the entrance buildings Nos. 19 and 37, exclusive of the materials furnished by the Government, there shall be paid to the parties of the first part, by the party of the second part, the sum of twelve thousand dollars. When the superintendent shall certify that one-half of the materials and labor is delivered and performed there shall be paid the further sum of twelve thousand dollars. When the superintendent shall certify that three-fourths of the materials and labor are delivered and performed there shall be paid the further sum of twelve thousand dollars; twenty per cent. being reserved on each of said payments as collateral security until the work is completed. When the work on said buildings is entirely completed, according to the plans and specifications, and to the satisfaction of the party of the second part, there shall be paid the balance remaining of the full sum, together with the reservations on the first three payments, to make up the sum of forty-
9 eight thousand two hundred and seven and ninety-five one-hundredths dollars. When the superintendent shall certify that one-fourth of the materials and labor for building the carpenters' shop, exclusive of the materials furnished by the Government, has been delivered and performed there shall be paid to the parties of the first part, by the party of the second part, the sum of three thousand five hundred dollars. When the superintendent shall certify that one-half of the materials and labor is delivered and performed there shall be paid the further sum of three thousand five hundred dollars. When the superintendent shall certify that three-fourths of the materials and labor are delivered and performed there shall be paid the further sum of three thousand five hundred dollars; twenty per cent. being reserved on each of the said payments as collateral security until the work is completed. When the building is entirely completed according to the plans and specifications, and to the satisfaction of the party of the second part, there shall be paid

the balance remaining of the full sum, together with the reservations on the first three payments to make up the sum of thirteen thousand eight hundred thirty-seven and eighty-one one-hundredths dollars. Payments to be made by the paymaster, at , within ten days after warrants for the same shall have been passed by the Secretary of the Treasury.

It is distinctly understood that the true intent and meaning of this contract is, that the parties of the first part are to furnish all the materials and perform all the work necessary to render the entrance buildings Nos. 19 and 37 and the carpenters' shop at the Norfolk navy-yard perfect and complete in every respect, according to the plans and specifications annexed, whether expressed in the same or not, and no extra charge for modifications will be allowed unless agreed upon by the parties, and no changes or modifications mutually agreed upon by the parties to this contract shall in any way affect its validity.

And it is further agreed that if the parties of the first part shall fail to complete this contract at the time or in the manner specified, to the satisfaction of the party of the second part, then the party of the second part shall have full power to enter upon and complete the work at the expense of the parties of the first part, and to recover of the parties of the first part such damages as have been sustained in consequence of said failure.

And it is further agreed and understood that all the articles embraced in the schedule of materials hereto annexed, are to be furnished the parties of the first part by the party of the second part, in addition to the considerations hereinbefore named, to be by the parties of the first part used in the reconstruction of the several buildings hereinbefore named.

(Signed) FRANCIS A. GIBBONS, JR. [SEAL.]
FRANCIS A. GIBBONS, SR. [SEAL.]
CHARLES D. GILMORE. [SEAL.]
A. A. HORMER. [SEAL.]
JOSEPH SMITH, [SEAL.]
Chief of Bureau of Y. and D.

Signed, sealed, and delivered in presence of—
THOMAS ALLCOCK,
H. A. HOLDEN,
H. A. HOLDEN,
H. A. HOLDEN.

As to signature of Jos. Smith—
JOS. EELLS, JR.

Specifications for entrance building.

U. S. NAVY-YARD, *Norfolk, Jan'y*, 1866.

The dimensions and projections, the sizes and forms of the different parts of the building, the apartments, height of stories, pitch of roof, &c., are clearly shown in the drawing.

The foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up to the height designated on the plan, by new work.

The stone masonry of the entrance and archway is to be cut range work, brown sandstone and granite forming the facade. The former to be cut and rubbed, the latter to be cut and dressed with eight peon hammers. The granite sills and lintels in all the building (i. e., the east and west wing and the entrance proper designated on yard plan by the Nos. 37
11 and 19) are to be cut in the same manner. The facade to be the best quality range ashler, well banded.

The coping and cornice as per plan. The entrance may be repaired with granite throughout as directed by the civil engineer.

The brick masonry to be of the same character as that of the old work; the walls to be built of the best hand-made hard red brick, laid in the best lime mortar and well bonded.

The carpenters and joiners' work is to be of the best quality; the floor joints to be 16 inches apart from centre to centre, with two rows of × bridging well blocked and nailed. The floors to be of 1½-inch planed tongued and grooved white pine No. 2 flooring plank, as per bill of material, and to be well wrought, beveled, and nailed down.

The second floor of the western wing to be supported on twenty-two columns best pine timber 12 x 12, dressed and capped with brackets supporting trimmers 12 x 14 running longitudinally, and to be reached by stairway as per plan.

The second floor of the eastern wing is to be supported by trusses and to have stairway as per plan.

The roof is to be framed with tie-beams formed of two pieces of timber 3½ by 12 inches, well packed and bolted, taking care to break joints in splicing, to be held up by 1⅜-in. round rods reaching from the junction of the strain-beam and principal rafters, which are to support the purlines and jack-rafters, the whole to be sheathed with sound inch No. 3 white pine boards, and slated as per plan with best slate 11 x 20. The jack-rafters to be in one piece, reaching from eaves to ridge. All the bents to be braced and bolted as per plan. Solid tie-beams may be substituted, reaching entirely across the building, at the option of the contractor, in lieu of the packed beams described, provided they are of the best
12 white pine timber, 8 x 12, free from knots, windshakes, or defects calculated to impair their strength or durability. The ridge and valleys to be covered with 4-lb sheet lead 16 inches wide.

The outside openings to consist of 38 doors, 49 windows, and 14 dormer windows in attic, as follows:

There is to be 18 outside pannel doors, with side lights and sash as per plan, 2 inches thick, and to be constructed of the best white pine lumber and hung on 4 (loose joint) hinges.

There is to be 20 2-inch lined doors, to be constructed of the best white pine lumber, 2-inch thicknesses of 1 inch each, to be fastened with wrought-iron nails and clinched; to be hung with wrought-iron strap hinges two feet long the eyes of which are to be anchored in the brick work; the hinges to be fastened on the doors with wrought-iron rivets.

There is to be 49 windows, box frames, with side lights, the middle sashes to be hung in frame as per sample of the portion of the building now executed, 12 of the above windows on the side fronting the city to have 2-inch lined shutters, made as nearly fire-proof as possible by a covering of sheet iron No. 30, to be hung with two strap 18-inch hinges.

The attic story will be lighted by 14 dormer windows constructed as per plan, with pediment and cornice returned on eaves; the lights to be 10 x 12.

Inside openings, first floor of entrance, four windows in the entrance wing, two opening into guard-room and two into watch-room, as per plan, box frames, with sash and pulleys.

There are to be two pannel doors connecting the entrance way with the wings, two inches thick, to be hung with large 4-inch butt hinges; they are to have suitable rim locks and bolts.

13 Second floor of entrance will be provided with two doors leading to the wings, the flooring of which being higher than the floor of the entrance will require three stair-steps or four risers to make the communication. These doors will be finished and hung similar to those in the lower story, but requiring heart pine thresholds; they will be provided with suitable locks, keys, &c.

The second story of the west wing (building No. 19) will be divided into 23 store-rooms, as per plan, with 11 communicating doors in the alternate partitions; passage-way along the centre of the floor; each room to have a door leading into same, with suitable locks and fastenings; to be panelled doors 1½ inch and hung with butt hinges and made of best pine boards. The first floor of the east-wing, marked building No. 37, is to be provided with an office and store-room for the boatswain, 16 x 17 each.

The second story of same is designed for sailmaker's loft, and is to be provided with two rooms and office and store-room, 16 x 17 each. The partitions to be constructed in a workmanlike manner, with inch planed, tongued, and grooved boards, No. 2, studded with 3 x 4 dressed scantling. The ceiling to be made of same material.

The two lined doors nearest the entrance-way, first floor, to be furnished with suitable rim locks with keys; the remaining lined doors to be fastened on the inside with strong bars; all the pannel doors to be furnished with good rim locks and keys.

The cupola to be built as per detailed drawings; floor and roof to be covered with copper.

The stone masonry, sills, pedestals, &c., of lower floor to be laid in best cement mortar.

The wood work of the buildings to be well painted with three coats of paint, as directed by the engineer. The glazing to be done agreeably to plan.

The cisterns at the east end of the east wing to be provided with proper hatchways, conductors, &c., for their use.

14 The rigging loft to be fitted with suitable stanchions, windlasses, and posts, for the rigger's use.

The building to be furnished with latest improved Orcutt's lightning rods; also copper gutters similar to those now used on the portion of the building now finished, to convey the water into the cisterns; copper to be 16 oz., cold rolled.

It is considered that in these specifications and the drawings referred to everything is embraced that may be necessary to complete the buildings aforesaid, but if after the work is under way anything should appear to have been omitted in either or both, accidentally, which shall be actually necessary and usual in completing such buildings, the contractor is not to

take advantage of such omission, but proceed in good faith to complete the building according to their true spirit and meaning, provided always that nothing here shall be construed as obligatory on the contractor to furnish any materials or fixtures or do any work without the province of these specifications.

ALEX. WORRELL,
Civil Engineer.

Correct copy.

R. G. STAPLES.

I certify the above to be a correct copy of the specifications as originally made by me and exhibited to the contractors for the work.

ALEX. WORRELL,
Civil Engineer.

Specifications for carpenters' shop.

U. S. NAVY YARD, NORFOLK, *January*, 1866.

The dimensions and projections the sizes, and forms of the different parts of the building, the apartments, heights of stories, pitch of roof, &c., are clearly shown in the drawings.

The walls now standing not injured by fire, the repairs of which have already been commenced, will remain and be carried up to the heights designated on the plan by new masonry, the stone work, sills, and lintels of the doors and windows (where the brick arch is not adopted) to be cut granite as per plan.

The first floor will have six large sliding doors on each side of the building, 2 at the ends, 14 in all, and to be finished with face brick arches as per plan; the brick floor now undisturbed will be covered by a wood floor of 2-inch plank, planed, jointed, and nailed down to secret joints, 4 x 6, and 7 feet apart from centre to centre. There will be seven (7) windows on each side of the building, 2 at each end, 18 in all. The masonry to be of the same character as that of the old work. The brick to be the best hand-made hard brick, and nearly as possible of the same color as the present brick.

A tool-room 16 x 17 to be provided, constructed of No. 3 inch boards, tongued, grooved, and planed.

The carpenter's and joiner's work to be executed in the most substantial manner. The pannel doors to be constructed with lights as per plan. The windows to be constructed with box frames with side lights. The middle sashes to be hung with approved cords and pulleys.

The second floor will be lighted with 13 windows on each side, three at each end, 32 in all, constructed in the same manner as the windows of the lower floor, except as to height. The floor will be supported by transverse trusses, 6 feet high, 12 in number, well framed with the beams, bolts, braces, nuts, and washers, the sizes and dimensions being given on the plan; the joists to be 3 x 12 and 16 inches from centre to centre, with two rows of x bridging, well blocked and nailed, to be covered with 2-inch best No. 2 white pine or spruce flooring plank, planed, tongued, and grooved, well wrought, leveled- and nailed down.

The stairway from lower floor is described on plan. The principal floor trusses to be anchored into walls.

The roof to be framed with tie-beams, packed and bolted, or
16 solid beams, equal dimensions, reaching the whole width of the building, at the option of the contractor; the frame, the sizes of timber, the braces, strain-beams, rafters, bolts, nuts, and washers, purlines, &c., are clearly shown in the drawing.

The jack rafters each to be one piece, reaching from eaves to ridge, the number of which are shown in the plan, to be covered with best No. 3 inch white pine sheathing boards, and to be slated with "Chapman Quarry" slate, 11 x 20. The ridge to be covered with 4-lbs. sheet lead, 16 inches wide; copper gutters are to be constructed on the eaves, with 16-oz. cold rolled copper of the usual size, and tinned on the inside, leading the water to the lower end of the building. The whole structure to be furnished with "Orcutt's" improved patent lightning-rods, to prevent accidents from lightning.

The attic story to be lighted by a large window at each gable end, the dimensions being given on the plan; a floor of 1¼-inch plank, square jointed, will be laid over the space between the principal vertical rods, upon joists 2½ x 10, placed 2 feet apart, of sound spruce or pine timber. The wood work of the building to be well painted with 3 coats of paint, as directed by the engineer. The work to be supervised and inspected by the civil engineer of the yard under the direction of the commandant.

It is considered that in these specifications and the drawings referred to everything is embraced that may be necessary to complete the building aforesaid, but if after the work is under way anything shall appear to have been omitted in either or both, accidentally, which shall be actually necessary and usual in completing such building, the contractor is not to take advantage of such omission, but proceed in good faith to complete the building, according to their true spirit and meaning.

ALEX. WORRELL,
Civil Engineer.

17 II. *General traverse.—Filed Feb.* 14, 1873.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of sixty-eight thousand three hundred and forty-eight dollars and seventy-four cents, says that they are not indebt' to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

WM. McMICHAEL,
Assistant Attorney-General.

18 III. *Plea of limitation.—Filed M'ch* 20, 1874.

Now come the defendants, by their Attorney-General, and say that the claimant herein should not further have or maintain his suit against the defendants, for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

JOHN GOFORTH,
Assistant Attorney-General.

19 IV. *Findings of facts and conclusions of law.*

This case having been heard before the Court of Claims, the court upon the evidence finds the following facts:

1. On the 22d day of May, 1866, the claimant and the defendants made and entered into the contract annexed to and forming a part of the petition, and said contract was so made in pursuance of an advertisement for proposals bearing date April 17, 1866, annexed to said petition. Attached to and forming part of the contract were the following specifications, and not the specifications set forth in the petition:

"SPECIFICATIONS FOR ENTRANCE-BUILDING.

"U. S. NAVY-YARD, NORFOLK, *January*, 1866.

"The dimensions and projections, the sizes and forms of the different parts of the building, the apartments, height of stories, pitch of roofs, &c., are clearly shown in the drawings.

"The foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up to the height designated on the plan by new work.

"The stone masonry of the entrance and archway is to be cut range-work, brown sandstone and granite forming the façade, the former to be cut and rubbed, the latter to be cut and dressed with eight peon hammers. The granite sills and lintels in all the building (i. e., the east and west wing and the entrance proper designated on yard-plan by the numbers 37 and 19) are to be cut in the same manner. The façade to be the best quality range-ashler, well bonded.

"The coping and cornice as per plan. The entrance-way to be repaired with granite throughout, as directed by the civil engineer.

"The brick masonry to be of the same character as that of the old work; the walls to be built of the best hand-made, hard, red brick laid in the best lime-mortar and well bonded.

"The carpenters and joiners' work is to be of the best quality; the floor-joists to be 16 inches apart from center to center, with two rows of × bridging well blocked and nailed. The floors to be of 1½-inch planed, tongued and grooved white pine No. 2 flooring-plank, as per bill of material, and to be well wrought, leveled, and nailed down.

"The second floor of the western wing to be supported on twenty-two columns of best pine timber, 12 x 12 inches, dressed and capped with brackets supporting trimmers 12 x 14 running longitudinally, and to be reached by stairway, as per plan.

"The second floor of the eastern wing to be supported by trusses and to have stairway, as per plan.

"The roof is to be framed with tie-beams formed of two pieces of timber 3½ by 12 inches, well backed and bolted, taking care to break joints in splicing; to be held up by 1⅜-inch round iron rods, reaching from the junction of the strain-beam and principal rafters, which are to support the purlines and jack-rafters, the whole to be sheathed with sound inch No. 3 white-pine boards and slated, as per plan, with best slate, 11 x 12. The jack-rafters to be in one piece, reaching from eaves to ridge. All the bents to be braced and bolted as per plan. Solid tie-beams may be substituted, reaching entirely across the building, at the option of the contractor, in lieu of the packed beams described, provided they are of the best white-pine timber, 8 x 12, free from knots, wind-shakes, or defects calculated to impair their strength or durability. The ridge and valleys to be covered with 4-pound sheet-lead 16 inches wide.

"The outside openings to consist of 38 doors, 49 windows, and 14 dormer windows in attic, as follows:

"There are to be 18 outside panel-doors, with side-lights and sash as per plan, 2 inches thick, and to be constructed of the best white-pine lumber and hung on 4-inch (loose joint) hinges.

"There are to be 20 2-inch lined doors, to be constructed of the best white-pine lumber, 2 thicknesses of 1 inch each, to be fastened with wrought-iron nails and clinched; to be hung with three wrought-iron strap-hinges two feet long, the eyes of which are to be anchored in the brick-work; the hinges to be fastened on the doors with wrought-iron rivets.

"There are to be 49 windows, box frames, with side lights, the middle sashes to be hung in frame as per sample of the portion of the building now executed, 12 of the above windows, on the side fronting the city, to have 2-inch lined shutters, made as nearly fire-proof as possible by a covering of sheet iron No. 30, to be hung with two strap 18-inch hinges.

"The attic story will be lighted by 14 dormer windows, constructed as per plan, with pediment and cornice returned on eaves; the lights to be 10 x 12.

"Inside openings, first floor of entrance, four windows in the entrance-way, two opening into guard-room and two into watch-room, as per plan, box frames, with sash and pulleys.

"There are to be two (2) panel doors connecting the entrance-way with the wings, 2 inches thick, to be hung with large 4-inch butt-hinges; they are to have suitable rim-locks and bolts.

"The principal floor-trusses of the building to be anchored into the walls.

"The second floor of entrance will be provided with 2 doors leading to the wings, the floor of which being higher than the floor of the entrance will require three stair-steps or four risers to make the communication; these doors will be finished and hung similar to those in the lower story, but requiring heart pine thresholds; they will be provided with suitable locks, keys, &c.

"The second story of the west wing (building No. 19) will be divided into 23 store-rooms, as per plan, with 11 communicating doors in the alternate partitions; passage-way along the center of the floor; each room

to have a door leading into same, with suitable locks and fastenings; to be paneled doors, 1½ inches, and hung with butt-hinges, and made of best pine boards. The first floor of the east wing, marked building No. 37, is to be provided with an office and storeroom for the boatswain, 16 x 17 each.

"The second story of same is designated for sailmakers' loft, and is to be provided with two rooms, an office and storeroom, 16 x 17 each. The partitions to be constructed in a workmanlike manner, with inch planed tongued and grooved boards, No. 2, studded with 3 x 4 dressed scantling. The ceiling to be made of same material.

"The two lined doors nearest the entrance-way, first floor, to be furnished with suitable rim-locks with keys; the remaining lined doors to be fastened on the inside with strong bars; all the panel doors to be furnished with good rim-locks and keys (keys not to be duplicated).

"The cupola to be built as per detailed drawings; floor and roof to be covered with copper.

"The stone masonry, sills, pedestals, &c., of lower floor to be laid in the best cement mortar; a niche to be provided for clock in entrance wall.

"The wood-work of the buildings to be well painted with three coats of paint, as directed by the engineer. The glazing to be done agreeably to plan.

"The cisterns at the east end of the east wing to be provided with proper hatchways, conductors, &c., for their use.

"The rigging-loft to be fitted with suitable stanchions, windlasses, and posts for the riggers' use. A clock with face 4 feet diameter to be in pediment, as shown on plan.

"The building to be furnished with latest improved Orcutt's lightning-rods; also copper gutters similar to those now used on the portion of the building now finished, to convey the water into the cisterns; copper to be 16 ounce, cold rolled.

"It is considered that in these specifications and the drawings referred to everything is embraced that may be necessary to complete the buildings aforesaid, but if, after the work is under way, anything shall appear to have been omitted in either or both, accidentally, which shall be actually necessary and usual in completing such buildings, the contractor is not to take advantage of such omission, but proceed in good faith to complete the building according to their true spirit and meaning. The work to be supervised and inspected by the civil engineer of the yard, under the direction of the commandant."

II. The specifications annexed to and forming part of the contract had been prepared by the defendants' engineer about the time of their date. They were shown by him to the claimant prior to his entering into the contract.

21 III. At the outbreak of the late rebellion these buildings mentioned in the contract were burnt, but portions of the walls were left standing. Prior to the proposals for the work an inspection of these fragmentary walls so left standing had been made by the officers of the Government in charge of the works, and those portions of them deemed unfit to form a part of the permanent structure were taken down, and those parts which were considered uninjured and proper to be built upon were left

standing for that purpose. After the agents of the Government had prepared the walls, retaining the portion which the civil engineer of the navy-yard in charge of the work supposed might be used in the new structure, the chief of the Bureau of Yards and Docks invited the examination of bidders by the advertisement annexed to the petition, and the claimant, by his agent, visited and saw the walls so standing. At the time the claimant, by his agent, so visited the yard he was shown the walls by a quarterman acting under the civil engineer of the yard. The claimant's agent asked if those walls were to stand. The quarterman replied that they were, so far as he knew, and that Mr. Williams, the master mason of the yard, and Mr. Worrall, the civil engineer of the yard, had said that they were to stand. (But it does not appear that the quarterman was authorized to make such representations to the claimant's agent.) And the civil engineer likewise represented to the claimant's agent that the portion of the walls then standing would remain and be used in the new work. After the claimant's agent had so visited the yard and been shown the walls the claimant made his bid.

IV. After the claimant had begun work under his contract it was discovered that a portion of the walls still standing had been so injured by the fire as to be unfit for building a superstructure thereon. Commodore Hitchcock, commanding the naval station, thereupon ordered that the walls be further razeed, and, pursuant to his orders, about one-third of the portion then standing was taken down by the claimant before proceeding to build. The effect of this second razeeing was that the claimant had to substitute new brick-work for that so removed; and the additional cost of construction thereby thrown upon him was the sum of $4,050; and for it he has received no remuneration additional to the price named or consideration expressed in the contract. It does not appear that at the time Commodore Hitchcock ordered the walls to be further razeed the defendants' officers made any pretense or claim that the increased expense was to be borne by the claimant as work required by the contract; nor does it appear that the claimant made any objection to the taking down of the walls as ordered by Commodore Hitchcock.

V. The brick-work and walls described in the preceding finding were completed before the 1st October, 1866. The buildings, comprising all the contract work of the claimant, were completed by the 26th November, 1866, except a few items of work amounting in value to $312.25. These remained unperformed by him on the 7th December, 1866. Subsequent to that date the estimated value of these items was withheld by the defendants' officers, with the concurrence of the claimant, from the final payment, in the manner following:

22 In the latter part of November, 1866, the claimant reported to the defendant's engineer in charge of the work that he had completed his contract work and was ready to turn over the buildings to the authorities of the navy-yard. On the 26th November the engineer reported this fact to the commandant, and specified at the same time a number of defects in the work and departures from the contract. On the 27th November the commandant referred the subject to a Board of Survey by the following order:

"NAVY-YARD, NORFOLK, VA., 37*th Nov.*, 1866.

"GENTLEMEN: You will carefully survey the building under contract of reconstructions by Mr. F. A. Gibbons, and state whether the conditions of the contract have been fully complied with. You will also examine the bills of charges for extra work, and state whether you consider the work extra under a fair construction of the contract; and, if so, whether the charges are fair. You will also examine such work as is called for by the contract, and omitted by permission or omission, and make off-sets of it against work not named in the specifications of the contract. The contract, together with the civil engineer's report and claim, & charges made by Mr. Gibbons, are herewith enclosed.

"Resp'y.

"S. C. ROWAN,
"*Comm'd't.*

"Captain C. R. P. RODGERS, *U. S. Navy.*
"Construct'g Eng'r WM. R. SINGLETON,
"*Navy-Yard, Norfolk, Va.*"

On the 28th November the Board of Survey, without stating whether the conditions of the contract had been fully complied with, reported the condition in which they found the buildings, specifying certain defects and imperfections, which report the commandant forwarded to the Chief of the Bureau of Yards and Docks of the Navy Department "for his instructions on the different points set forth" in the report. On the 30th November, the Chief of the Bureau of Yards and Docks approved a voucher which authorized the payment of $5,000 to the claimant upon the fourth or final installment of his contract, but which directed that "the final payment and third reservation are withheld until the buildings are inspected and formally received." No formal acceptance of the buildings by the defendants is shown; but on the 18th December, 1866, the engineer in charge made out a voucher for final payment, which was duly certified, approved, and paid; and is (with the certificate of the engineer and receipt of the claimant) in the following terms:

NAVY-YARD, NORFOLK, *Dec.* 18, 1866.

"*U. S. Navy Department per U. S. navy-yard, Norfolk, to F. A. Gibbons, Dr.*

"Bureau Yards and Docks. Appro.: 'Improvements.'

"For material and labor delivered and performed in rebuilding entrance buildings Nos. 19 and 37 at the Norfolk (Va.) navy-yard (exclusive of material furnished by the Government), being the balance due of the 4th or final payment.....			$7,207 95
"Less:			
"1,250 bricks furnished by Gov't,	@ $21.00.....	30 00	
"$3\frac{2083}{2240}$ tons bitum's coal,	" 10.62.....	31 12	
"1,925 lbs. scrap wrought iron,	" $2\frac{1}{2}$ cts.....	48 12	
			109 24
"Balance due.....			$7,098 71

"I hereby certify that the entire material and labor contracted for by F. A. Gibbons on the above building have been delivered and performed except $312.25, which is deducted from bill of extras of this date.

"WM. R. SINGLETON, *Const. Eng'r.*

"Approved 24 Dec., 1866.

"JOS. SMITH, *Ch'f of Bu.*

23 "Approved 20th Dec., 1866, for seven thousand & ninety-eight dollars seventy-one cents, and ordered to be paid by paymaster.

"S. C. ROWAN, *Com'd't.*

"Received, Washington, D. C., Dec. 31, 1866, of C. C. Jackson, paymaster U. S. Navy, the sum of seven thousand ninety-eight dollars and seventy-one cents, in full of the above bill.
"$7,098.71.]

"FRANCIS A. GIBBONS."

VI. At various times prior to the 28th October, 1866, the claimant, at the request of the defendant's officers, furnished material and performed labor additional to that required by the contract. On the 29th November, 1866, he wrote to the Chief of the Bureau of Yards and Docks, inclosing his account of such extras, amounting to $4,688.09. On the 6th December the account was referred to a Board of officers. On the 11th December the Board reported, allowing some items in full, reducing some in amount, and rejecting others in toto. The items so allowed by the Board amounted to $2,394.89, instead of $4,688.09 demanded by the claimant. On the same day the claimant served upon the commandant of the navy-yard a paper purporting to be a protest against the action of the Board. On the 5th January, 1867, the commandant approved a voucher authorizing the payment of the items and amount allowed by the Board. On the 25th January, 1867, the claimant accepted payment of the amount allowed, and receipted therefor in full. All of the foregoing papers were in the words following:

"NAVY-YARD, NORFOLK, VA., *Nov. 29th*, 1866.

"ADMIRAL: Enclosed you will receive account of materials furnished and extra work done by me to complete the east and west wing and entrance proper, denominated entrance-buildings of navy-yard, at Norfolk, Va., under contract made with your Department, dated 23rd May, 1866.

"I deem it proper to say that the engineer and commandant in charge of the construction of said buildings was duly notified touching the principal items charged, by letters on file among the paper' in the case. The work was subsequently ordered by the commandant and civil engineer and executed. The value of the items charged were made by two disinterested mechanics, and certified to by the engineer in charge at the time as correct.

"Very respect*ing*, yours,

"FRANCIS A. GIBBONS.

"To Admiral JOSEPH SMITH,
"*Bureau Yards & Docks, Washington, D. C.*"

"NAVY-YARD, NORFOLK, VA., *Oct.* 28, 1866.

"Account of extra work on entrance-building:

(5) five chimneys, at $20 each.....	100 00
(3) three side doors, at $30 each.....	90 00

(1) one flight of stairs		60 00
(70) seventy yards of plastering in water-closets and old buildings		31 50
(23) twenty-three transoms, at $6.00		138 00
(1) one doorway complete		30 00
Putting up partitions in water-closets		10 00
Ceiling joist in chapel		25 00
Stripping top of partition in passage		15 00
(10) ten stove-flues, at 50 cts. each		5 00
Work in paymaster's office		5 00
Moulding washboards in passage		5 00
Washboards in water-closets		5 00
(3) hatchways, at $10 each, ordered by Col. Sanger		30 00
24 250 cubic feet white-oak timber, at $40 pr		100 00
1,680 feet B. Y. M. pine, @ $50 per M		84 00
1,024 pounds bolt iron, @ 9 cts. per lb		92 16
Labor on same		772 48
Extra work on west-end entrance:		
1,048 yards plastering, @ 45 cts. per yd		516 60
Trimming (22) twenty-two windows, @ $10		220 00
" (23) " three doors, @ $17		161 00
432 lineal feet washboarding, @ 20 cts. per foot		86 40
The above has been certified to by civil engineer of yard.		
940 pounds lead-flashing around fourteen dormer windows, cupola, @ 13 ct'		122 20
Labor on same		100 00
Veranda on south fronts		300 00
Old materials of marine barracks taken by Government		1,200 00
235 feet six (6) inch diameter copper water-pipes from west-end wing, ordered by Mr. Warrel, @ $1.25 per foot		293 75
60 feet ashlar, @ $1.50 per foot		90 00
		$4,688 09

"The above account is in full, except a small bill of iron and nuts not drawn from the naval store, which has been deducted in the estimate of material advanced.

" N. B.—The above iron was unfit for the use intended.

"FRANCIS A. GIBBONS."

NAVY-YARD, NORFOLK, VA., *6th Dec'r*, 1866.

GENTLEMEN: You are hereby constituted a "Board" for the purpose of exam'ing the contract & specifications made between F. A. Gibbons, on the one part, & Bureau of Yards & Docks, on the other part, & take into consideration the claims of the contractor, Gibbons, for extra work of all sorts, & report, in duplicate, what are extras, & what should be paid for them.

"Such work as you consider extra, upon a fair interpretation of the contract & specifications, you are at liberty to sommon such experts in the yard as will aid you in fixing the amount of award for such extras.

"The contractor will be duly notified, that he may be present during the investigation. The contract and specifications, together with the claims of Mr. Gibbons, and other papers connected with the transactions, are herewith enclosed.

"Respectfully,

"S. C. ROWAN, *Commandant.*

"Commander R. T. RENSHAW, *U. S. Navy,*
"Paymaster G. E. THORNTON, *U. S. Navy,*
"Constructing Engineer WM. R. SINGLETON,
"Foreman of Carpenters G. R. BOUSH,
"*Navy-Yard, Norfolk, Va.*"

"NAVIGATION OFFICE,
Navy-Yard, Norfolk, Va., 11th Dec., 1866.

"Rear-Admiral S. C. ROWAN, U. S. N.,
Com'd'g Naval Station, Norfolk, Va.:

"REAR-ADMIRAL: After consulting the most reliable and expert authorities with regard to the claim of contractor F. A. Gibbons on the Bureau of Yards and Docks for extra work on the main-entrance building of this yard, we have, agreeable to your order of the 6th inst., the honor to make the following report:

"1st. The claim for $549.50, viz:

(5)	five chimneys, at $20 each	$100 —
(3)	three side doors, at $30 "	90 —
(1)	one flight of stairs	60 —
(70)	seventy yards plastering in water-closets of old building	31 50
(23)	twenty-three transoms, at $6 each	138 00
(1)	one doorway complete	30 00
	Putting up partitions in water-closets	10 00
	Ceiling joints in chapel	25 00
	Stripping top of partition in passage	15 00
25	(10) stove-flues, at 50 cts. each	5 00
	Work in paymaster's office	5 00
	Moulding washboards in water-closets	5 00
(3)	three hatchways, at $10 each	30 00
		549 50

is, in the opinion of the Board, a fair claim, and recommend it to be allowed.

"2nd. The claim for $1,048.64, viz:

	250 feet white-oak timber, at 40 cts. per foot	$100 —
	1,680 feet B. M. Y. pine, at $50 per M	84
	1,024 pounds of bolt iron, at 9 cts. per lb	92 16
	Labor on same	772 48
		1,048 64

is not recommended to be allowed, and the Board consider that $567.64 (five hundred and sixty-seven dollars and sixty-four cents) is a fair compensation for the same.

"3rd. The claim for extra work on west-end entrance, $984, viz:

1,148 yards of plastering, at 45 cts. per yard	$516 60
Trimming (22) twenty-two windows, at $10	$220 00
(23) twenty-three doors, at $7 per door	161 00
432 lineal feet of washboarding, at 20 cents per foot	86 40
	984 00

is recommended to be allowed.

"4th. The claim for $522.20, viz:

940 pounds lead flashing around (14) dormer windows and cupola	$122 20
Labor on same	100 00
Varanda on south front	300 00
	$522 20

is considered by the Board to be a part of the contract, and not recommended to be allowed.

"5th. The claim for $1,200, for material of old barracks, is not recommended to be allowed, as it was not a part of the old entrance building.

"6th. The claim for $293.75 (two hundred and ninety-three dollars and seventy-five cents), for 235 feet, six inches (6) diameter, copper water-pipes from west wing, ordered by Mr. Worrell, at $1.75 per foot, is recommended to be allowed.

"7th. The claim for $90.00, for 60 feet ashlar, at $1.50 per foot, is not recommended to be allowed.

"In conclusion, the Board have to state that they consider $2,394.89 (two thousand three hundred and ninety-four dollars and eighty-nine cents) to be a just and fair compensation to contractor F. A. Gibbons for the extra work done on the main-entrance building at this yard.

"Very respectfully, your obed't serv'ts,

"R. T. RENSHAW,
Commander, U. S. N.
"G. E. THORNTON,
Paymaster, U. S. N.
"WM. R. SINGLETON,
Constructing Engineer.
"GEO. R. BOUSH,
Foreman of Carpenters.

"Approved.

"S. C. ROWAN, *Comm'd't.*"

"NORFOLK, *Dec.* 11, 1866.

"Admiral S. C. ROWAN,
"*Commandant Norfolk Navy-Yard:*

"SIR: The undersigned, acting on and in behalf of the contractor, H. A. Gibbons, jr., hereby protests against the action and desisson of a Board of Survey ordered by the Bureau of Yards & Docks, the members thereoff being appointed by you, which is to determine the amount due me for

constructing the entrance building No. 19, 37, & gale-way; also carpenter-shop at the dry-dock, instead of repairing the same according to contract dated 22 May, 1866, for the following reasons, to wit:

"First. The engineer who made the plans & specifications has
26 estimated the stone ped'ment and a bill of small items in the Sept. and Oct. estimates by order of the Bureau of Yards & Docks, which bills remain unpaid.

"Second. That brick walls build by me, which was not within my contract as shown, can only be properly estimated by the engineer who made the drawings & specifications.

"Thirdly. In composing a Board of Survey, the contractor is intitled to a choice of a portion of said Board, according to justice, all of which has been denied me this day by you. My nessesities require money to pay for labor & material, and therefore will be compelled to take what is & has been paid under protest.

"F. A. GIBBONS, SEN.,
"For F. A. GIB'ONS, JR.

"Served by B. R. Johnson.
"NORFOLK, *Dec.* 11, 1866."

"NAVY-YARD, NORFOLK, *Dec.* 18, 1866.

"*U. S. Navy Department, per U. S. navy-yard, Norfolk, to F. A. Gibbons, Dr.*

"Bureau Yards & Docks. Appr'n: 'Improvements.'

"For amount of 'extra work' in rebuilding 'entrance building' Nos. 19 & 37, as per report of Board of officers, convened by order of Rear-Admiral S. C. Rowan, dated Dec. 6, 1866.

5 chimneys, @ $20.00 ea	$100 00
3 side doors, @ $30.00 ea	90 00
1 flight of stairs	60 00
70 y'ds of plastering in water-closets of old building	31 00
23 transoms, @ $6.00 ea	138 00
1 doorway, complete	30 00
Putting up partitions in water-closets	10 00
Ceiling joints in chapel	25 00
Stripping top of partition in passage	15 00
10 stove-flues, @ 50c. ea	5 00
Work on paymaster's office	5 00
Moulding wash-boards in water-closets	5 00
3 hatchways, @ $10.00 ea	30 00
250 f't W. O. timber, 1,680 f't B. M. Y. pine, 1,024 lbs. bolt iron, and labor on bits in rigging-loft	567 64
1,148 y'ds plastering, @ 45c. p'r y'd	516 60
Trimming 22 windows, @ $10.00 ea	220 00
23 doors, @ $7.00	161 00
432 lineal f't wash-boarding, @ 20c. p'r f't	86 40
235 f't copper water-pipe, 6 in. dia., from west wing, @ $1.25 p'r foot	293 75
	$2,389 39

1,826 lb. ¾ to 1⅜ round iron, retained in N. store.....	$86 72	
281 iron nuts, @ 10c. ea., 2 in., " " " "	28 10	
81 " " @ 4½c. ea., 1½ in., " " " "	3 64	
		118 46
" Total.....		$2,507 85
" Less:		
Ceiling of court-room.....	$132 00	
Fastenings for windows.....	21 00	
Labor for same.....	14 00	
Bolts for windows.....	10 00	
Door-knobs.....	24 00	
Labor on same.....	3 25	
Fastenings to windows in court-room.....	3 00	
Painting stairway.....	5 00	
Putting up clock.....	100 00	
		$312 25
Balance due.....		$2,195 60

" I hereby certify that the above is a true account of the allowances for work, and that this estimate is made in conformity with instructions from the Bureau of Yards & Docks.

" WM. R. SINGLETON,
" *Const'g Eng'r.*

27 "Approved 5th Jan'y, 1867, for twenty-one hundred & ninety-five dollars sixty cents, and ordered to be paid by paymaster.
"S. C. ROWAN, *Com'd't.*"

" Received, Washington, D. C., January 25th, 1867, of C. C. Jackson, paymaster, U. S. Navy, the sum of twenty-one hundred & ninety-five dollars and sixty cents, in full of the above bill.
"$2,195.60.]

"FRANCIS A. GIBBONS."

VII. Under the contract and specifications the claimant had the option of putting into the building solid tie-beams or packed beams as he might elect; and the defendants furnished to the claimant certain material for packed beams as a part of the consideration of the contract. In the progress of the work the defendants' engineer decided that the material so furnished by the defendants was defective and unfit for the purpose, and he required the claimant to put in solid beams. This requirement of the engineer threw upon the claimant the additional cost of $362.79. This item was not embraced by the bill of extras set forth in the preceding finding. The work was done and material furnished prior to the 6th December, 1866.

VIII. In the progress of the work the claimant was required by the defendants' engineer to put in twelve brown-stone capitals instead of brick-work. These capitals threw upon the claimant the additional expense of $621.48. They were not required by the contract and specifications, and were not embraced in the bill of extras set forth in the sixth finding. They were furnished prior to the 7th December, 1866.

IX. In the progress of the work the claimant was required by the defendants' engineer to put under the first floor certain supporting or foundation walls, about three feet in height, running the length of the building. The value of this brick-work was $18 per thousand bricks, but the claimant has not produced evidence to show the quantity of wall thus constructed. These supporting walls were not required by the contract, nor embraced in the bill of extras set forth in the sixth finding. They were furnished and completed prior to the 7th December, 1866.

X. In the progress of the work the claimant was required by the defendants' engineer to erect a portico on the southern front of the main building. The value of this portico was $300. It was not required by the contract, but was embraced in the bill of extras set forth in the sixth finding. It was completed prior to the 6th December, 1866.

And upon the foregoing findings of fact the court decides as conclusions of law:

CONCLUSIONS OF LAW.

The complainant should recover $4,050 for the additional work performed by him upon the walls of the building as set forth in Finding IV. And the claimant should further recover $362.79 for the extra expense cast upon him by being required to put in the building solid tie-
28 beams, as set forth in Finding VII. And the claimant should further recover $621.48 for the extra expense cast upon him by being required to put in the building brown-stone capitals, as set forth in Finding VIII. And as to the other demands of the claimant, his petition should be dismissed.

V. *Opinion of the court.*

NOTT, J., delivered the opinion of the court:

The first and most important question in this case is as to the construction that should be given to the second clause of the specifications, which is in these words: "The foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up to the height designated on the plan by new work."

When it becomes the duty of a court to ascertain the true construction which should be given to a disputed article of a contract, there are three things which ordinarily should be the subject of consideration: 1st, the circumstances known to both parties which preceded and attended the making of the contract in the light of which it should be interpreted; 2d, the general purpose of the contract and those specific provisions which directly or indirectly bear upon and affect the provision which is the subject of controversy; 3d, the language and effect of the clause or article to which a construction must be applied. We will consider these in their order.

The circumstances known to both parties which preceded and attended the making of this contract were these:

The old walls were in the possession and under the control of the defendants. It was to their interest that as much as possible of these old

walls should be saved, yet that no imperfect portion should be retained. To a contractor it mattered not until he entered into a contract whether much or little should be utilized. If the former, there would be so much the less work for him to do; if the latter, he would be paid for doing so much the more; in either case he could regulate his bid by the amount of old wall that was to enter into the new building. But it was vital to every contractor to know how much of the old walls would remain, and how much new work he must contribute. A superficial inspection would not tell the bidders what was the real condition of the walls. It was necessary that they be dismantled of the injured parts if the contractors sending in proposals were to make close and accurate estimates; otherwise every bidder would leave margin enough in his calculations to cover the unknown contingency, and the result might be that the Government would be allowed little or nothing for the old walls. Such being the conditions of the case, the officers of the Government, instead of leaving the walls as the fire left them, and turning them over to the contractor to be razeed by him to such extent as might be found necessary, pulled down what they deemed the imperfect portions, and apparently left only so much of them standing as was fit for the new superstructure. They next prepared the specifications afterward annexed to the contract, and then handing the contractor a copy of these specifications on the one hand and showing him the razeed walls on the other, invited him to make proposals for erecting a superstructure.

These circumstances, so far as they go, point to an interpretation favorable to the claimant. The duty of the court is to ascertain not what the parties may have secretly intended as contradistinguished from what their words express, but what is the meaning of words they have used. It is merely a duty of interpretation; that is, to find out the true sense of the written words as the parties used them; and of construction, that is when the true sense is ascertained, to subject the instrument in its operation to the established rules of law."

29 (1 Greenleaf, § 277, p. 323.) If the defendants had turned the old wall over to the contractor untouched at the time he entered into the contract, that would have been a significant, a controlling fact against him. If it was not their intention to save the uninjured portion of the walls and reject the injured, why did they touch them? If the contractor was to assume the risk of the old walls, what object had the defendants in apparently rejecting and apparently retaining a portion before inviting his bid? Somebody had to assume the risk of the old walls being fit to build upon. Responsibility for their fitness (in the absence of express words to the contrary) would naturally be assumed by the party who owned them and controlled them and put them into the contract, and who apparently had prepared them for the uses and purposes of the contract. It would be contrary to the ordinary dealings of men to infer from such circumstances that the party who did not own them or control them, who did not put them into the work as his contribution toward the new building, and who had not examined, tested, or prepared them for a new superstructure was to assume and be responsible for their fitness.

The other terms and provisions of the contract which have any bearing upon this point are not very significant, but so far as they go are likewise favorable to the claimant. In the first place, the contract, like the advertisement upon which it was founded, was not for rebuilding the edi-

fice, but for "repairs." In the second place, the contract expressly throws "the risk and expense of all the materials and work" which the claimant was to "furnish" upon him, but does not in terms, if at all, throw upon him any risk as to the fitness of the walls furnished by the defendants. In the third place, the contract also expressly provides "that all the materials furnished and work performed" by the claimant "should be of the best quality and subject to the inspection, approval, or rejection" of the defendants' superintendent. The old walls were neither material furnished nor work performed by the claimant, and there was no provision expressly authorizing their rejection by the party who furnished them. In the fourth place, the contract is not like that in Dermott v. Jones (2 Wall. R., 1), where the contractor agreed to build a house and have it "fit for use and occupation" by a certain day. Here the contractor simply agreed to repair a partially existing building under the supervision of the other party's officers and according to the plans and specifications annexed. In other words, his responsibility for the fitness of the old walls does not, if it exist, spring out of the general purpose or express covenants of the contract, but must be attributed entirely to the single clause of the specifications which has been quoted.

That clause of the specifications was prepared by the defendants before the contract was made, and was shown to the claimant when he was estimating for the work. Upon the faith of it he made his bid. Its language is, "The foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up to the height designated on the plan by new work." It is manifest that this language needs some amplification to make its meaning clear. The defendants contend in effect that it means ["so much of] the foundations and the brick walls now standing [as subsequent examination may show] were uninjured by the fire will remain and be carried up." The claimant contends that the true construction is, "The foundations and the brick walls now standing [being those portions] that were uninjured by the fire will remain."

As was held by the Supreme Court in Garrison case (7 Wall. R., 688; 7 C. Cls. R., 78), "doubtful expressions should be construed most
30 strongly against the party who uses the language." This expression of this contract is "doubtful," because its meaning cannot be rendered certain without the interpolation of words (one way or the other) which the party who used the language neglected to employ. The defendants first razeed the burnt walls to their own liking by throwing off the supposed injured parts; then prepared these specifications; then gave them to the claimant to estimate upon; then made them a part of the contract without a word of amplification or a provision that should make their meaning clear and certain; and now seek to interpolate into them, in two distinct places, modifying words without which their ambiguous language does not bear the construction they give to it, and with which all responsibility concerning the matter in controversy will be shifted from themselves to a party who neither furnished the walls nor draughted the specifications.

For these doubtful acts and doubtful expressions the defendants are justly responsible. The old walls were their contribution toward the new building to save themselves the expense of so much new work; they were not put in for the benefit of the contractor; and it seems unreasonable to hold that he was to take the risk of the defendants' material being fit for the pur-

pose for which they intended it should be used. If the defendants withdrew this part of their material and made the contractor furnish other material of his own in its stead, and do more work than he would otherwise have been required to do, the law will imply a contract on their part to pay for that which they ordered done.

For this reason it was not necessary that the contractor should object. If the defendants had ordered a change of the material which he had agreed to furnish, or in the work which he was bound to perform amid circumstances that might imply or warrant the belief that no additional expense would result from the change, it would have been his duty to notify them that he could not make the substitution for the contract-price. But if they had determined to abandon the old walls in toto, and to substitute entire new walls and entire new foundations, or if they had determined to withdraw the old lumber which they likewise had put into the contract as a portion of their contribution to the work, and directed new lumber to be substituted by the contractor, assuredly no notice would have been necessary on his part to tell them that the substitution must be at their cost and charge. The commanding officer of the naval station, Commodore Hitchcock, did not indeed order the entire walls to be obliterated, but he did order one-third of them to be removed. He was not the engineer in charge (termed by the contract "the superintendent of the work"), who had power to reject the contractor's materials; but he was the representative of the defendants, their highest responsible officer on the ground, in constant communication with the Chief of the Bureau of Yards and Docks, and presumably acting with the knowledge and approval of the Bureau, and he, acting for the defendants, withdrew one-third of this old wall material from the contract, and directed the contractor to furnish new material in its stead. The defendants reaped the benefit of this substitution, and it would be highly inequitable and narrowly technical to defeat the contractor's recompense were we to hold that he ought to have notified the officer that substituting new material for old would necessitate additional outlay by the defendants. What was palpable to the contractor was palpable to the officer. He who wanted the work done intended to pay for it. Qui sentit commodum, debet et sentire onus. But it is not a case where mistake or misrepresentation can be set up, or where an option could have been exercised. If the change was not
31 necessary, it would have been most iniquitous in Commodore Hitchcock to have ordered it at the contractor's cost; if, in his judgment, it was necessary, it had to be made regardless of the question who was to pay for it.

It is proper to add that the representations made to the claimant's agent, as set forth in Finding III, at the time the walls were shown to him, we put entirely out of sight. If this were a suit to reform the contract, such evidence would be admissible; and it may be that if the civil engineer (who is designated in the specifications as the person who was to supervise and inspect the work) had authority to make such representations they would be a part of the res gestæ, admissible to show the thing contracted for; but as the authority of the officer is doubted we prefer to exclude his representations in the consideration of the case.

2. The second question of importance in the case is whether its consideration upon the merits is barred by the statute of limitations.

The item of $4,050 for tearing down and replacing portions of the old

wall was not, strictly speaking, extra work. The wall as finally constructed was neither longer nor higher nor of different material than the wall which the contract called for. The demand is properly to recover an extra expense thrown upon the contractor contrary to the true intent and requirements of the contract. Strictly, he sues not for work outside of the express agreement, but for the defendants' breach of their implied covenant that he should be allowed to use and utilize the old walls as they stood when he received them. His action for this work must needs be upon the specific contract, and he could not have brought an action upon it while it remained executory. The counsel for the defendants has insisted that if this was additional work it was rendered under an implied contract, and that the cause of action accrued and the statute began to run the moment the work was completed. But we are of the opinion that the cause of action sprang out of the specific contract, and that no action could have been maintained by the claimant while it remained executory, and that it so remained until the buildings were accepted by the defendants subsequent to the 7th December, 1866.

The item of $362.79 is of the same nature. The defendants furnished to the contractor a portion of the material necessary for packed beams and gave him his option to put them in or solid-tie beams, as he might elect. They were not at liberty, in the face of their agreement, to say that the material so furnished was not suitable, and compel the contractor to put in the other kind of beams. This was a hinderance and expense thrown upon the contractor contrary to the terms of the contract, but was in no sense extra work under a different or an implied agreement. Instead of being able to bring an action in assumpsit for these beams as for work not required by the contract, the claimant's cause of action sprang out of the very terms of the contract.

The items for brown-stone capitals and for supporting foundation-walls, on the contrary, are clearly cases of extra work. They were not required by the contract; they were distinct things which the claimant had not agreed to construct or furnish; and he might have gone on and completed all that he had agreed to do without them. They were furnished before the 7th December, 1866, and if the claimant could have maintained an action for them while the specific contract remained executory they are barred by the statute.

The contract contemplated "changes and modifications." It provided that "no extra charge for modifications will be allowed unless agreed upon by the parties, and no changes or modifications mutually agreed upon by the parties to this contract shall in any way affect its validity." It further provided that three specific installments of $12,000 each (of sums
32 in gross and not percentages) should be paid to the contractor as the work progressed, and finally that the balance which might become due to him should not be paid until the work should be "entirely completed" "to the satisfaction of the party of the second part."

On the 7th December, 1866, the work had not been entirely completed. If payment for extra work falls within the foregoing provision of the contract the statute of limitations does not preclude a recovery.

As the Supreme Court said in Dermott v. Jones (2 Wall. R., 1), "While a special contract remains executory the plaintiff must sue upon it." "He must produce the contract upon the trial, and it will be applied

as far as it can be traced; but if, by the fault of the defendant, the cost of the work or material has been increased, in so far the jury will be warranted in departing from the contract prices." If the claimant had brought his action for any of these items of extra work immediately after performing it the defendants might have answered that the contract was still executory; that it was to be applied so far as it could be traced; that no payments were to be made except the installments specified in the contract until the buildings should be completed and accepted; that it cannot always be determined what are extras until the contract work be done; and that by the plain import of the contract the defendants were not to be thus harassed, and that such suits were premature.

It is not easy to understand how the provision that "no changes or modifications mutually agreed upon by the parties to this contract shall in any way affect its validity" can have any other significance. Certainly changes or modifications mutually agreed upon would not per se affect the validity of an express agreement; certainly they would affect the price, notwithstanding this clause, for it cannot be supposed that either party intended that extra work should be furnished without an additional consideration. The only rational interpretation of the clause is that those provisions of the contract which threw upon the defendants the obligation of paying three specific installments, and assured to them the privilege of having all other payments delayed and gathered up into one final payment when the entire work should be completed, was not to be impaired by demands for extras, but should remain valid, i. e., operative as to them as well as to the subject matter proper of the express agreement.

3. As to the bill of extras dated October 18, 1866, reduced by the naval Board from $4,688.09 to $2,394.89, set forth in the sixth finding, we think the case comes under the decision of the Supreme Court in Child, Pratt & Fox case (12 Wall. R., 232; 7 C. Cls. R., 209). There the claimants protested against the action of the Holt-Davis-Campbell commission; but they subsequently accepted the reduced amount allowed by the commission, and receipted therefor in full without protest. That was precisely what the claimant here did, and his case cannot be distinguished from theirs.

The judgment of the court is that the claimant recover:

For the extra work upon the wall	$40 50
For the entire expense in putting in solid beam	362 79
For the brown-stone capitals	621 48
Amounting in the aggregate to	5,034 27

VI. *Dissenting opinion.*

DRAKE, Ch. J., dissenting:

From so much of the opinion of the majority of the court as holds
33 the claimant entitled to recover $4,050 for an additional quantity of brick put into the walls over and above what he supposed before he made his proposals would be necessary, I am constrained to dissent.

The case, stated in condensed form, is as follows:

At the outbreak of the rebellion certain brick buildings in the Norfolk navy-yard were burnt, but portions of the walls remained standing.

In 1866, the Bureau of Yards and Docks of the Navy Department advertised for proposals for the repair of those buildings, and the advertisement contained this clause:

"Persons desiring to bid must necessarily visit the yard and examine the present condition of the works, and can there see the plans and specifications to enable them to bid understandingly."

In anticipation of the repairs, the officers of the navy-yard had caused portions of the walls to be taken down; after which, and after the advertisements for proposals had been published, an agent of the claimant visited the yard and saw the plans and specifications of the work proposed to be done, and was shown the walls by a quarterman acting under the civil engineer of the yard. The agent asked if those walls were to stand. The quarterman replied that they were, so far as he knew, and that Mr. Williams, the master mason of the yard, and Mr. Worrall, the civil engineer of the yard, had said that they were to stand. But it does not appear that the quarterman was authorized to make such representations to the claimant's agent. And the civil engineer likewise represented to the agent that the portion of the walls then standing would remain and be used in the new work. After the claimant's agent had so visited the yard and been shown the walls, the claimant made his bid, which was accepted, and the contract sued on was entered into in pursuance thereof.

After the claimant had begun work under the contract it was discovered that about one-third of the walls still standing had been so injured by the fire as to be unfit for building a superstructure thereon; and thereupon the commandant of the yard ordered that portion of the walls to be taken down, which was done; and in consequence thereof the claimant was obliged to furnish bricks of the value of $4,050 over and above what would have been necessary if he could have built upon the walls as they stood when his agent examined them, before making his proposals.

The claimant, at the time, made no objection to that taking down of the one-third of the walls.

Upon the case as thus in substance stated the majority of the court, as it seems to me, hold that there were two contracts between the claimant and the Government: first, the written one sued on; and secondly, a previous unwritten one, resulting from a visit of the claimant's agent to the navy-yard and the then condition of the walls that were shown to him, from which condition and showing, it is claimed, resulted an implied undertaking and agreement on the part of the Government that the walls as they then stood and were shown to the agent were fit to be used and should be used to support the new superstructure which the proposed repairs would require to be built upon them.

It is said that if no part of the old walls had been taken down by the Government officers before the claimant entered into the contract sued on, or, in other words, if the walls had been seen by the agent in the exact condition they were left in by the fire, and had been turned over to the contractor in that exact condition, to be razeed by him to such extent as
when he entered upon the work he might find necessary, the whole
34 responsibility would have rested on him, and upon him would
have fallen all the expense and loss consequent upon the razeeing, however great it might have been. In this view I concur; but when it

is claimed that because before the agent visited the yard, and before any advertisement for proposals was published, the Government caused a part of the walls to be razeed, it thereby said to all who might thereafter come to examine the parts left standing that it assumed the risk of those parts being fit to build upon, and, therefore, that those parts should stand as they were, and that the new work should be built upon them just as they stood, I am quite unable to see how so important an engagement could be held to grow out of the mere fact of the partial razeeing, standing by itself, without any declaration by any authorized representative of the Government that the Government intended that fact to amount to or to be regarded by any one as amounting to such an engagement.

But if it be supposed that this undertaking of the Government resulted not alone from the fact that parts of the walls were left standing, but from that coupled with the other fact that the parts left standing were shown to the claimant's agent by servants of the Government, there is to my mind a sufficient answer to the proposition in the further fact, that what the Government intended to say in regard to the walls was not left to inference, but was precisely expressed in the written specifications of the proposed work shown to and examined by the claimant's agent at the time, and afterwards made a part of the contract. The existence of those specifications and the agent's knowledge of them at the time, in my opinion, utterly preclude any implication against the Government in regard to the walls, growing out of their having been left standing and shown to the agent. Expressum facit cessare tacitum is a maxim which seems to me to close and bar the door against any such implication.

The agent visited the yard after the advertisement for proposals was published. What took him there? Of course nothing but, in the words of the advertisement, "to examine the present condition of the works and see the plans and specifications, to enable him to bid understandingly." The Government said to him and all others, in effect, "There are repairs to be done at the Norfolk navy-yard, and the work is to be let out by contract. Go and examine the condition of the works, the plans and the specifications, and see whether you will bid for the job." That was all the Government asked him to do, and all that he then had a right to do, so far as the Government's invitation was concerned. The advertisement made no representations, except to indicate the particular buildings to be repaired; did not say that this or that wall or part of a wall was or was not to stand; simply left the whole matter to be examined by any one who thought fit to do so. When the agent went there, he knew all that, or was bound to know it; and knowing it, he made such examination as he saw fit, without let or hinderance from any one, presumably taking his own time, using his own methods, extending his scrutiny at his own will, and, without doubt, relying on his own senses, his own observation, and his own judgment in reaching results. If he made a superficial or unskillful examination, or a careful and skillful but insufficient one, it was wholly at his own risk; the Government had nothing to do with it.

If it was the intention of the Navy Department that the walls as they then stood should be built upon, every dictate of ordinary business capacity, of the plainest common sense, and of common honesty would
35 have prompted its announcement in the advertisement; but it was not there. So far from that, the specifications opened with this stipulation:

"The foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up to the height designated on the plan, by new work."

Whatever meaning may be ingeniously ascribed to those words, it is noteworthy that the claimant did not in his petition aver that he or his agent understood them at the time to mean that the walls then standing were fit to build upon and were to remain as they then stood; nor did his counsel in his brief take any such position; nor has either ventured to claim, much less has any attempt been made to prove, that the claimant's bid was based on his or his agent's understanding that that was the meaning of those words. If that had been his supposition, is it reasonable to suppose that he would not have averred and attempted to prove it? I think not. And because he did neither the one nor the other it is to my mind conclusive evidence that he had at the time no such suppotion.

But, however that may be, those specifications were made a part of the contract, and it is the business of the court to declare their meaning.

It is assumed that this expression of the contract is doubtful, because its meaning cannot be rendered certain without the interpolation of words; and therefore the court must needs interpolate words. It is my misfortune not to be able to perceive any just grounds for doubt as to the meaning intended. Placing myself in thought, as nearly as I can, in the positions occupied by the Navy Department on the one hand and the claimant on the other, it seems to me clear, first, that the Department, to save expense and to secure solid and stable work, would mean to use all parts of the walls which were fit to sustain the new work, and not to use any parts which were so injured by fire as to be unfit therefor; and, secondly, that the bidder, to avoid the danger of the old walls giving way under the weight of the new work, and so bring loss to him, would seek to avoid building new work upon walls or parts of walls that had been so injured by fire as to put him to that risk. It was therefore clearly to the interest of each party to use no parts of the old walls that had been injured by fire, and to use all the uninjured parts thereof, and unless some imperative reason be shown why they did not express that intent in the clause in question, I am bound to hold that they did, and am not authorized to defeat that intent by inserting words in it.

It is claimed that the clause should be construed as if it read: "The foundations and the brick walls now standing [being those portions] that were uninjured by the fire will remain." But where is the authority for the interpolation included in brackets? I know of no such authority. The parties themselves did not make it.

If it was the intention of the Navy Department to say what that interpolated sentence says, all that was needed to that end was simply not to have inserted the words "that were uninjured by fire," and then it would read: "The foundations and the brick walls now standing will remain and be carried up * * * by new work." So framed there could have been no question about the meaning; and if that had been the intention of the Department would it not have been so expressed?

When, therefore, the clause was not so shaped, but those words were inserted, had they not a purpose and a meaning? When the sentence was made to read: "The foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up * * * by new
36 work," ought there to be any reasonable doubt about the meaning?

Is it not clear that the intent was to except from the general stipulation the walls or parts of walls that had been injured by the fire? In other words, is it not plain that what was to "remain and be carried up by new work" was what was "uninjured by fire"? When bids were asked for the repair of burnt buildings, is it conceivable that the walls which had been injured by the fire, the very things that were to be repaired, should stand just as they were, without repair, and be carried up by new work?

But to my mind the claimant has by his own acts precluded himself from any recovery on account of the razeeing of the walls after the contract was entered into.

For the sake of the argument let it be admitted that the clause in question is ambiguous. It has been held by this court that if the parties to a contract, while the contract is in process of execution, do, either expressly or by tacit concurrence, agree or act upon a particular construction of it, neither party can afterwards set that construction aside and insist upon a different and inconsistent one. (Merriam's case, 14 C. Cls. R., 289; and see Swift & Co.'s case, ibid., 208.)

Can it be for a moment doubted that this claimant, while the work was in progress, tacitly acquiesced in the construction put by the Government's officers on this now for the first time disputed clause? If the claimant really considered it his right under the contract to build upon the walls as they stood when his agent examined them, would he, when ordered by the commandant of the yard to razee one-third of them, have done so, and gone on to rebuild them without uttering a word of objection? Is it consistent with any sensible view of his capacity to understand his rights under the contract, and how to protect them, to suppose that neither when the order to razee was given, nor when he proceeded to obey it, nor yet up to the hour when, after the completion of the whole contract job, he received the final payment on account of it, he should have been dumb?

If, on the other hand, the previous examination had shown his agent that parts of the old walls, as his agent saw them, were, in fact, so injured by fire as to have to come down, and his bid was based on the knowledge of that fact and the calculations necessarily resulting from that knowledge, his silence when the razeeing was ordered and done is instantly and satisfactorily explained as an indication of his own consciousness that the razeeing was necessary and right, and had been by him calculated upon and estimated for before he framed the bid which got him the contract.

When, therefore, on one theory his silence is unnatural and inexplicable, and on the other is quite natural, and also quite consistent with our observation and experience of men, I am compelled to adopt the latter as the true theory of his action.

And when the silence remains unbroken until nearly six years after the whole work was done, and after he had rendered a bill purporting to charge for all extra work done by him, as well as for the contract work, and had been paid in full, and then for the first time this claim is set up, I am constrained to the conviction that it is an afterthought and a mere speculative demand, as, in my opinion, it is without merit in conscience or justification in law.

But were every view I have expressed insufficient, there is one other which seems to me conclusive.

If the circumstances of the agent's examination of the works, and what

he then saw, are to have any effect towards the claimant's recovery
37 here, they are to have that effect by engrafting on the written contract a stipulation not found in its words. To do that requires words to be inserted in the contract as signed and acted under by both parties. If any one rule in the law of contracts is settled, and has been so always, it is that such a thing cannot be done; and that when parties, after whatever conversation or preparation, at last reduce their agreement to writing, that is to be looked upon as the final consummation of their negotiation and the exact expression of their purpose. The parties write the contract when they are ready to do so, for the very purpose of including all that they have finally agreed upon, and excluding everything else, and so make this certain and permanent. (2 Parsons on Contracts, 5th ed., 548; Oelricks v. Ford, 23 Howard, 49; Hawkins v. United States, 12 C. Cls. R. 181; affirmed on appeal, 96 U. S. R., 689.)

Discarding, then, all in regard to the walls but the one clause of the specifications which has been discussed, I hold that that clause is without ambiguity; that the claimant acted upon it as having the meaning put upon it by the Navy Department; that he made no objection to what was required of him under it; and finally settled for his pay under it without protest or demur. Such being the case, I can see no justification for awarding him any part of the $4,050 allowed him by the majority of the court.

38 VII. *Final judgment.*

At a Court of Claims held in the city of Washington on the 22d day of March, A. D. 1880, judgment was ordered to be entered up as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Francis A. Gibbons do have and recover of and from the United States the sum of five thousand and thirty-four dollars and twenty-seven cents ($5,034.27).

39 VIII. *Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 23d day of March, 1880, in favor of claimant, the defendants, by their Attorney-General, on the 12th day of June, 1880, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Filed June 12, 1880.

AT CHAMBERS.

Allowed.

C. D. DRAKE,
Chief Justice.

40 IX. In the Court of Claims.

FRANCIS A. GIBBONS
vs.
THE UNITED STATES. } No. 6845.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-

entitled cause, of the findings of facts by the court and the conclusion of law thereon, of the opinion of the court, of the dissenting opinion, of the final judgment of the court, of the application of the defendants for the allowance of an appeal to the Supreme Court of the United States, and of the order of Chief Justice Drake allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 30th day of September, 1880.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 302. The United States, appellant, vs. Francis A. Gibbons, jr. Court of Claims. Filed 4th October, 1880.

11837——3

119-200

OFFICE SUPREME COURT U. S.
FILED
OCT 15 1883
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES, APPELLANT,
vs.
FRANCIS A. GIBBONS, JR.
} No. 57.

BRIEF ON THE PART OF THE UNITED STATES.

5065

119-200

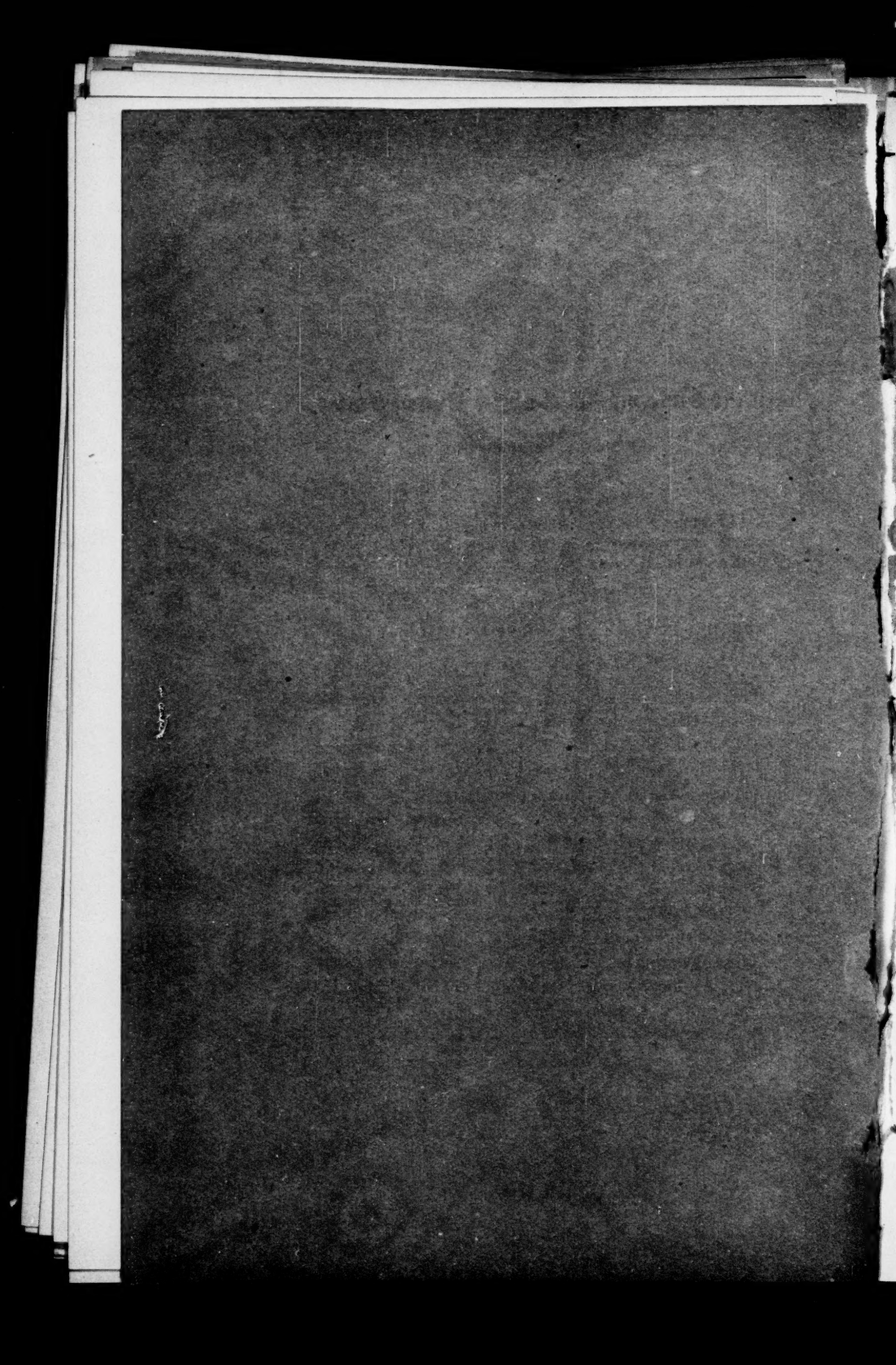
OFFICE SUPREME COURT U. S.
FILED
OCT 15 1883
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES, APPELLANT,
vs.
FRANCIS A. GIBBONS, JR. } No. 57.

BRIEF ON THE PART OF THE UNITED STATES.



In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES, APPELLANT,
vs.
FRANCIS A. GIBBONS, JR. } No. 57.

BRIEF ON THE PART OF THE UNITED STATES.

This case grows out of a contract between the appellant and the appellee, by which the latter agreed for a specific consideration to repair or reconstruct certain buildings in the Norfolk navy-yard which were destroyed by fire at the outbreak of the rebellion in 1861.

The petitioner demanded judgment against the United States for the sum of $68,348.74. (R., p. 3.) The defendant pleaded the usual traverse and also the statute of limitations. (R., pp. 10, 11.) The court rendered judgment for $5,034.27, and dismissed the petition as to the residue of the demand. (R., p. 24.)

The amount of the judgment is made up of three items, to wit: $4,050 for extra work upon the walls; $362.79 for the entire expense of putting in solid beams, and $621.48 for the brown-stone capitals. (R., p. 22.)

The petitioner has submitted to the judgment dismissing his petition as to all his demand, saving the three items above mentioned, and consequently the only questions arising on this appeal are those touching the three items in question.

The contract required that the work should be done "according to the plans and specifications annexed." (R., p. 6.)

The material facts relating to the first item of $4,050 are as follows:

The specifications referred to in the contract contained this provision:

> The foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up to the height designated on the plan by new work. (R., p. 11.)

The advertisement inviting the attention of bidders contained this paragraph:

> Persons desiring to bid must necessarily visit the yard and examine the present condition of the works, and can there see the plans and specifications, to enable them to bid understandingly. (R., p. 4.)

The specifications were prepared by the defendant's engineer, and were shown by him to the petitioner prior to his entering into the contract. (R., p. 13.)

The court found that after the burning of the buildings in question portions of the walls remained standing; that prior to proposals for the work the officers of the Government in charge of the works had taken down such portions of the walls as were deemed unfit to form part of the permanent structure, and those parts considered uninjured were left to be built upon. It was in this condition of the walls that bidders were invited to examine the

works and specifications, and accordingly the petitioner, by his agent, visited and saw the walls so standing. They were shown him by a quarterman acting under the civil engineer of the yard. The agent asked if those walls were to stand. The quarterman replied that they were, so far as he knew, and that the master mason and engineer of the yard had said they were to stand; but it did not appear that the quarterman had any authority to make these representations. The agent was, furthermore, told by the civil engineer that the walls then standing would remain and be used in the new work.

After this visit of his agent the petitioner made his bid.

But after petitioner had begun work under the contract it was discovered that a portion of the walls still standing had been too much injured to be built upon; and thereupon the officer in command of the yard ordered one-third of the walls to be further "razeed," at an additional cost to the petitioner of $4,050. It does not appear that at he time the order was given to pull down the walls the defendant's officers claimed that the petitioner was to bear the increased expense as work required by the contract, nor does it appear that the claimant made any objection to the taking down of the walls, as ordered.

The brick work and walls were completed before the 1st October, 1866; the buildings comprising all the contract work of the claimant were completed by the 26th November, 1866, except a few items of work, amounting in value to $312.25.

ARGUMENT.

If the principle that all treaties and negotiations leading to a contract in writing are merged in the contract is to be adhered to, there would seem to be no ground on which

the judgment of the learned court below as to the item in question can be sustained.

The contract expressly requires that the work shall be done in accordance with "the plans and specifications annexed," and the specifications require that of the walls standing at the time the contract was made only so much thereof *as was uninjured by fire* should be built upon.

While it is true that every written paper may be read in the light of the circumstances in which it was made, as by a lamp, it is equally true that such circumstances can never afford warrant for introducing into the paper a condition or qualification not to be found in its language, however violent the presumption may be that such was the true intent of the parties.

Therefore, it is to no purpose to say, as does the court below, in the face of the explicit language of the specifications, which, with the contract, make a common context that the parties must have contemplated, that the walls as they stood at the time the contract was made should be built upon, because it was impossible to decide as to their condition upon a superficial view of them; for all this might be admitted without diminishing the force of the argument against the judgment. If the petitioner chose to contract without having the proper information before him that is certainly no ground for asking this court to exercise a dispensing power over the contract. As was said in Dermott *v.* Jones (2 Wall., 7) "against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him."

Nor does it matter under whose control the walls were or for whose interest it made if they stood or were pulled down,

or that before proposals were invited the defendant tore down such portions of the walls as were deemed unfit to support a superstructure, if the petitioner put his hand to a contract containing the provision that only so much of the foundations and walls should enter into the new work as were uninjured by the fire.

Now, does not the contract in question contain such a provision? Its language is: "The foundations and the brick walls now standing *that were uninjured by the fire* will remain and be carried up to the height designated on the plan by new work."

The reading contended for by the petitioner, and sustained by the court below, is that "the foundations and the brick walls now standing [*being those portions*] that were uninjured by the fire will remain, &c." But the answer, indeed we may venture to say the obvious answer, to this contention is that it produces a redundancy in the language of the sentence which it is not at all probable would have occurred if the contracting parties had meant what is attributed to them, for if the walls *as then standing* were to enter into the new work *why was any reference made to the fire?* It would have been entirely sufficient to say, and all that men of business would have said, that "the foundations and the brick walls now standing * * * will remain." That would have covered the whole subject, and it is submitted that it never would have occurred to the parties to use the additional words, "that were uninjured by the fire," unless they had meant to say that the contractor should not use any portion of the foundations and walls that might turn out to be so injured. It can hardly be supposed that the language used would have been employed if the appellant had torn down portions of

the old walls and cleared away the *débris* for the purpose of ascertaining how much of the old structure was fit to be *used*, and not for the purpose of affording facilities to bidders for inspecting for themselves, the foundations and walls to the best advantage as we contend was the case.

There is nothing in the circumstances in which the contract was made which renders it at all unreasonable that the Government should have restricted the use of the old structure to such parts of it as were uninjured by the fire. Perhaps if the petitioner had visited the works himself, instead of relying on an agent, he would have tested the walls and ascertained their condition; for as the advertisement inviting proposals stated that "persons desiring to bid *must necessarily visit the yard and examine the present condition of the works*, and can there see the plans and specifications, to enable them to bid understandingly," (R., p. 4), it is to be presumed that any examination of the works would have been permitted that was necessary to form an opinion as to their condition.

If, now, it was the intention of the parties that Government should take the risk of the sufficiency of the foundations and walls, can there be a doubt that the appellee would have insisted on having that feature of the contract embodied in words that gave no such uncertain sound as he insists the words used in the contract do?

In resolving the ambiguity which the court finds in the sentence in question, it says that the language is that of Government; but it is difficult to comprehend how it is any more the language of Government than that of the contractor, for the contract is executed by both parties. As Mr. Preston says in his edition of the Touchstone, "but in an indenture executed by both parties they [the words]

are to be considered as *the words of them both*." (P. [88] note 81.) The case of Garrison *v.* U. S. (7 Wall., 688) is entirely accordant with this view.

But supposing there is an ambiguity in the contract, as contended, the case is one for the application of the test laid down by an eminent judge. "Tell me," said he, "what the parties to a contract have done, and I will tell you what that contract means." Say this court in Chicago *v.* Sheldon, 9 Wall., 54, "In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, *the practical interpretation by the parties themselves is entitled to great, if not controlling, influence.*" *Vide* Lowber *v.* Bangs, (2 Wall., 737). Now, what was the conduct of the appellee when ordered to pull down the walls? Did he protest; did he insist that the additional masonry that would be required would be outside the contract? He said never a word. And the court below hold that he was not called on to speak. But how could he be silent under the express provision of the contract that "no extra charge for modifications will be allowed *unless agreed upon by the parties*"? (R., p. 6.) He was bound to speak if what was demanded of him was a modification of the contract and he intended to claim compensation for it, seeing that the contract required that such compensation should be the subject *of a new agreement.* We maintain that the conduct of the appellee at this juncture is wholly inconsistent with the position he now occupies. Again, the silence of the officers of Government is pregnant, for it was their duty to make a new agreement at once with the appellee if the additional masonry was extra work.

But the judgment as to the item in question is erroneous on another ground. If the theory of the appellee is correct, it was a modification of the contract to require portions of the old walls to be pulled down and new masonry supplied in their room. Now, the contract, as we have seen, expressly prohibits any recovery for "extra charge for modifications" "unless agreed upon by the parties." It is, therefore, a condition precedent to any such recovery that the contracting parties should have come together *ad hoc*. There is not, however, a scintilla of evidence that they did, or that any act was done on the part of Government to waive this feature of the contract, for nothing short of the recognition of the Bureau of Yards and Docks, the channel through which Government became a party to the contract, could have had that effect. (Hawkins *v.* U. S., 97 U. S., 689; Ford *v.* U. S., 7 Court of Claims Rep., 60; Dale *v.* U. S., 14 *ib.*, 514.)

But, in addition to all this, the commandant of the yard had no authority to authorize a departure from the contract, and the appellee yielded to him at his peril.

The other two items of the judgment appealed from are also clearly modifications of the contract, but as findings VII and VIII (R. p. 21), which relate to these items, show no agreement as to such modifications nor any waiver of the contract in that behalf, it would seem, if the aforegoing reasoning is sound, that the suit for the amounts forming these items is not maintainable.

The question arising on the statute of limitations is submitted without argument.

WM. A. MAURY,
Assistant Attorney-General.

169-200

SUPREME COURT U. S.
FILED
OCT 16 1883
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES, *Appellant*,
vs.
FRANCIS A. GIBBONS, JR., *Appellee*.
No. 57.

Brief for Appellee.

This is an appeal from a judgment rendered by the Court of Claims in favor of the claimant for the sum of $5,034.27.

On the 22d day of May, 1866, the plaintiff entered into a contract with the United States whereby he agreed to furnish the labor and such materials as might be necessary for certain buildings at the Norfolk Navy Yard, according to plans and specification prescribed, and forming a part of the contract. At the outbreak of the rebellion these buildings were burnt, but portions of the walls were left standing. An inspection of these fragmentary walls was made by the officers of the Government in charge of the work, and those portions of them which were deemed unfit to form a part of the permanent structure were taken down, and those parts which were considered uninjured were left standing, and were prepared ready to form a part

of the reconstructed building. Upon this state of circumstances bids were invited for "repairing" the buildings, and the appellee was the successful bidder as to two of them. The claim was principally based upon work done and materials furnished, which were not contemplated when the contract was made, and not included in the contract price. It now relates to three items only which were allowed by the Court of Claims, as follows:

1. For additional work performed by the claimant in constructing new walls in lieu of a part of the old walls previously inspected by the Government and pronounced good..	$4,050 00
2. For solid tie-beams substituted by the United States for padded beams.....	362 79
3. For brown-stone capitols not required by contract, but specially ordered by the United States..... ...	621 48
Total	$5,034 27

The main controversy concerns the largest item—for new materials and additional work—and the question is: Which party assumed the risk of the condition of those parts of the old walls approved and left standing by the agent of the Government. It is contended by the claimant, and denied on the other side, that this risk was upon the United States.

The circumstances connected with the preparation of the old walls for the reception of the new work, and the representations made to the contractor prior to the bidding, are stated by the Court of Claims, as follows:

> "At the outbreak of the late rebellion these buildings mentioned in the contract were burnt, but portions of the walls were left standing. Prior to the proposals for the work, an inspection of these fragmentary walls so left standing had been made by the offi-

cers of the Government in charge of the works, and those portions of them deemed unfit to form a part of the permanent structure were taken down, and those parts which were considered uninjured and proper to be built upon were left standing for that purpose. After the agents of the Government had prepared the walls, retaining the portion which the civil engineer of the navy-yard in charge of the work supposed might be used in the new structure, the Chief of the Bureau of Yards and Docks invited the examination of bidders by the advertisement annexed to the petition, and the claimant, by his agent, visited and saw the walls so standing. At the time the claimant, by his agent, so visited the yard he was shown the walls by a quarterman acting under the civil engineer of the yard. The claimant's agent asked if those walls were to stand. The quarterman replied that they were, so far as he knew; and that Mr. Williams, the master mason of the yard, and Mr. Worrall, the civil engineer of the yard, had said that they were to stand. (But it does not appear that the quarterman was authorized to make such representations to the claimant's agent.) And the civil engineer likewise represented to the claimant's agent that the portion of the walls then standing, would remain and be used in the new work. After the claimant's agent had so visited the yard and been shown the walls, the claimant made his bid."

"After the claimant had begun work under his contract, it was discovered that a portion of the walls still standing, had been so injured by the fire as to be unfit for building a superstructure thereon. Commodore Hitchcock, commanding the naval station, thereupon ordered that the walls be further razeed, and, pursuant to his orders, about one-third of the portion then standing was taken down by the claimant before proceeding to build. The effect of this second razeeing was that the claimant had to substitute new brick work for that so removed; and the additional cost of construction thereby thrown upon him was the sum of $4,050, and for it he has received no remuneration additional to the price named or consideration expressed in the contract. It does not appear that at the time Commodore Hitchcock ordered the walls to be further razeed

> the defendants' officers made any pretense or claim that the increased expense was to be borne by the claimant as work required by the contract; nor does it appear that the claimant made any objection to the taking down of the walls as ordered by Commodore Hitchcock."

It is found to be a fact, as will be seen from the above, that the civil engineer of the yard who was in charge of the work, Alex. Worrell, took down the old walls so far as he deemed them unfit for use and those parts, which he considered uninjured he put in order, for forming a part of the reconstructed buildings. He afterward prepared the specifications, (13,) and he exhibited them to the agent of the claimant. He was, by the terms of the specifications themselves which form a part of the contract, designated as the supervisor and inspector of the work as it progressed. (13.) The agent of the claimant visited the yard prior to making his bid and inquired whether or not the agents of the United States intended that these parts of the walls, then standing, were to remain and form a part of the reconstructed buildings, and he was told by a subordinate that it was intended that they should so remain, and this assurance was afterwards given to the agent of the contractor by the supervising engineer himself, also. Upon this state of facts and these assurances, the bid was made and the contract entered into. The Court of Claims held that ther isk, of the fitness of the old wall rested upon the government, and not upon the contractor.

One of the fundamental rules for the interpretation of contracts as laid down by this court, is as follows:

> "Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled

> to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described." (*Nash* vs. *Towne*, 5 Wall., 699.)

This is a contract for "repairs," and not for the construction of buildings. When one person employs another to build a house on a given lot, the presumption is that he will furnish the lot, and the presumption is equally strong and conclusive, that in a case where one party employs another to repair a building, the building to be repaired will be pointed out and furnished for that purpose. In this case the buildings were furnished with some of the walls standing, and some of them removed, and those parts which were standing were pointed out by the owner as the walls to be carried up—as the starting-point. It turned out, on further investigation, that some of these walls were not sufficiently substantial, and that they must be removed, or, in other words, that they did not furnish the starting-point.

The only provision of the contract which relates specially to this question, is the second paragraph of the specification which is as follows:

> "The foundation and the brick walls now standing that were uninjured by the fire, will remain and be carried up to the height designated in the plan by new work."

These specifications, it will be remembered, were prepared before proposals were invited, and were exhibited to the bidder at the time of his examination of the ruins; they were before both him and the engineer in charge of the work, at the time the inquiry was made whether or not "those walls were to stand," and also when the engineer assured the claimant that they should stand. These circumstances should seem to establish the fact that it had then

been determined which walls were injured and which uninjured. The words in the specifications—"that were uninjured"—were put there as an assertion or an assurance of an existing fact, and not as a suggestion of an uncertainty requiring investigation. The bidders who came forward were not to pass judgment on those walls, nor, indeed, on any walls, old or new. All the work was to be subject to the "approval of," and was required to be done to the satisfaction of the party of the second part. (4 & 5.) Why should the contractor be made an inspector of the walls of these public buildings in one instance more than in another. It seems to me, from all these circumstances, that the judgment of the Court of Claims is right.

In the court below it was argued that the claim was barred by the statute of limitations. The principal finding of that court on this point is as follows, (14):

> "The brick work and walls described in the preceding finding were completed before the 1st of October, 1866. The buildings, comprising all the contract work of the claimant, were completed by the 26th November, 1866, except a few items of work, amounting in value to $312.25. These remained unperformed by him on the 7th December, 1866. Subsequent to that date the estimated value of these items was withheld by the defendants' officers with the concurrence of the claimant from the final payment, * * for the purposes of an investigation touching the character of the work and materials put in the building by the contractor." (14, 15.)

Such an investigation appears to have been ordered and made by a board of officers as to a "number of defects in the work and departures from the contract." (14.) This board made its report on the 28th of November, 1866, and—

> "on the 30th November, the Chief of the Bureau of Yards and Docks approved a voucher which authorized the payment of $5,000 to the claimant upon the

> fourth or final instalment of his contract, but which directed that '*The final payment and third reservation are withheld until the buildings are inspected and formally received.*' No formal acceptance of the buildings by the defendants is shown; but on the 18th December, 1866, the engineer in charge made out a voucher for final payment, which was duly certified * * * and on the 20th and 24th days of December, 1866, was approved, and was, on the 31st of December, 1866, finally paid to the contractor. (15, 16.)

The petition was filed December 7th, 1872. It will be plain from an examination of these findings of fact, that on the 7th of December, 1866, a large part of the work remained unpeformed; on the 30th of November, 1866, the final payment was "withheld until" the buildings should be "inspected and formally received." Following this, come the approval of this "withheld" voucher on the 18th day of December, and its payment on the 31st day of December, 1866. (15, 16.) Bearing upon this branch of the case is that part of the contract which provides "that all the materials furnished and work performed, shall be of the best quality and subject to the inspection, approval or rejection of the superintendent," (4,) and also, that provision in the payment clause (5) which declares that "for the full and entire completion of the entrance buildings Nos. 19 and 37, *to the satisfaction of the party of the second part*, there shall be paid," &c., &c.

There can be no dispute as to the fact that on the 7th of December, 1866, a large part of the work "remained unperformed" and that on the 30th of November previous, an order had been made delaying the final acceptance of, and payment for, the work and that this final payment was not consented to by the Government, until December 18th. This was the day on which the Government declared that the work had been "completed" to its "satisfaction." Therefore, on that day the contractor became entitled to his final payment and his claim "accrued."

The statute on this subject, provides that all claims shall be barred unless the petition shall be filed in the Court of Claims "within six years after the claim first accrues." (R. S., § 1069.)

Before the 18th of December, 1866, the contractor had no right of action; prior to that date he could not have filed his "petition" in the Court of Claims, because his claim had not accrued.

The two small items allowed by the Court of Claims are included with the main item. They belonged to the whole work. The contractor could not divide his claim. He could not sue in one action for the work on the extra wall, in another for his solid beams and in still another for his brown stone capitols. Each of these items formed a part of his contract, as modified, and he could not sue until he had "completed" the whole work, upon the performance of which he had entered, to the "satisfaction of the party of the second part." If authority is needed in support of this doctrine it will be found in the following decisions of this court.

> "When he (the contractor) has been guilty of fraud, or has wilfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has, in good faith, fulfilled, but not in the manner or not within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitas assumpsit*.
>
> "He must produce the contract upon the trial, and it will be applied, as far as it can be traced; but if, by the fault of the defendant, the cost of the work or materials has been increased, in so far, the jury will be warranted in departing from the contract prices. In such cases the defendant, to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and time of the performance.

> "There is great conflict and confusion in the authorities upon this subject. The propositions we have laid down are reasonable and just, and they are sustained by a preponderance of the best considered adjudications." (*Dermott* vs. *Jones*, 2 Wall., 9.)

The various questions involved in this case were very fully and ably discussed by Mr. Justice Nott, in the opinion of the Court of Claims, to which the attention of this court is invited. (15 Court of Claims R., 174.)

It is therefore submitted that the judgment of the Court of Claims should be affirmed.

ENOCH TOTTEN,
Counsel for Appellee.